United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

B p1s.

75-1213

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

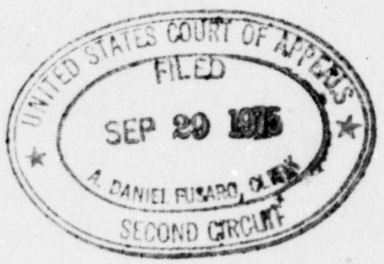
MICHAEL GLAZER,

Appellant.

Docket No. 75-1213

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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I

The Government does not dispute that the definition of the elements of the crime given by the District Judge in his charge to the jury included an erroneous statement of the critical fact that the jury had to find in order to render a guilty verdict.* Instead, the Government argues that there

*The Judge charged only that appellant Glazer had to have known of an agreement, and did not require a finding that he be a party to it.

there was no objection, and that other portions of the charge cured the defect.

Precedents of the Supreme Court and this Court establish that a charge to the jury which omits, misstates, or relates in a confusing manner an element of the crime is erroneous so as to affect a substantial right of the defendant and that a reversal of the judgment is required even if defense counsel interposed no objection. Screws v. United States, 325 U.S. 91 (1945); United States v. Howard, 506 F.2d 1131 (2d Cir. 1974); United States v. Clark, 475 F.2d 240, 248 (2d Cir. 1973); United States v. Fields, 466 F.2d 119 (2d Cir. 1972); United States v. Byrd, 352 F.2d 570 (2d Cir. 1965).

In Screws, the "question of intent was not submitted to the jury with the proper instructions" (Id., 325 U.S. at 106) because the jurors were told only that, in order to convict, they had to find that the defendant used more force than was necessary, when in fact the intent required was that the defendant have the purpose to deprive the victim of his constitutional rights. The Court stated:

> It is true that no exception was taken to the trial court's charge. Normally, we would under these circumstances not take note of the error.... But there are exceptions to that rule.... And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion.
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> Id., 325 U.S. at 107.

In Fields, this Court was no less clear that an error of the kind which occurred here was so substantial as to require reversal without objection:

> This is not, after all, a case of nitpicking over nuances in a judge's charge; the errors go directly to a defendant's right to have the jury told what crimes he is actually being tried for and what the essential elements of those crimes are.
>
> Id., 466 F.2d at 121.

The Government says that an earlier paragraph in the charge in this case cures the error of failing to instruct the jurors that appellant had to be a party to the agreement. A reading of that paragraph shows that it also does not state clearly that the jury must find that appellant himself was a party to the agreement. It states that appellant and his co-defendant Kaps "falsely represented that there had been no agreement with any other person to fix" the bids. At best, this is ambiguous as to whether the agreement had to be between appellant and another person, or just other people. However, when taken with the next part of the charge, which was the definition and explanation of the elements of the crime in the usual outline form, and which states only that appellant had to know of the agreement, the charge became hopelessly confusing. If the paragraph relied upon by the Government states what the Government asserts it does, the charge is internally inconsistent; if the paragraph cited by the Government is ambiguous, the only one on which

the jury could have relied for clarification was the erroneous one. Of a confusing charge, this Court has stated:

> If justice is to be done in accordance with the rule of law, it is of paramount importance that the court's instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime that must be proved by the government beyond a reasonable doubt, ... [an undefined but stated essential element of the crime requires definition.] Absent clarification this would have required a new trial, since the effect was almost surely to confuse or to leave an erroneous impression in the minds of the jury.
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> United States v. Clark, supra, 425 F.2d at 239.

In United States v. Byrd, supra, this Court explained the significance of omitting an element of the crime from the portion of the charge which outlines the crime, as was done here when the Judge failed to tell the jurors they had to find appellant was a party to the agreement:

> Thus, in the very climax of the charge the court in short explicit terms gave the jury what they would naturally regard as the nub of the law of the case and which, coming at the end of the exposition of the law, gave them what they were most likely to hold in their minds and apply to the facts in their deliberations, and which, not only completely omitted criminal intent as an essential element but, specifically told the jury that, if they found the other four elements which were mentioned, they had a duty to convict.
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> Id., 352 F.2d at 574.

Thus, the arguments posed by the Government have been rejected by this Court.

The Government next asserts that this was an issue placed before the jury by a reading of the indictment and the questions asked in examination, and that thus the jurors must have been aware that it was the question they were to determine. This Court has stated that when the Government has the burden of proof, only a concession by the defense that the element is not disputed will make an omission of that element from the charge harmless (see United States v. Howard, supra, 506 F.2d at 1134), and that even if the proof on the element is substantial, the jury is required to find that the Government met its burden of proof. United States v. Screws, supra; United States v. Fields, supra.

The Government cites United States v. Gillilan, 288 F.2d 796 (2d Cir. 1961), for the proposition that a reading of the indictment alone is sufficient to charge the jury of the crime. That may be true where a reading of the count "sufficiently advised the jury of what they had to decide." Here, however, there was an erroneous charge given on the indictment, and that makes the error reversible.

II

Since the Government has conceded before this Court that incarceration of an indigent pursuant to 18 U.S.C. §3569 solely for non-payment of a committed fine is unconstitutional (United States v. Wolff, 2d Cir. Doc. No. 73-1284), in order to avoid a decision on the merits to that effect by this Court the Government argues that appellant's claim is premature.

It is the impact of the judgment of conviction now before this Court which is the subject matter of this appeal. The judgment in this case in effect incorporates §3569. If §3569 is not declared unconstitutional, then the judgment which incorporates it is invalid, for without specifically excluding from the judgment a commitment for failure to pay because of indigence, the judgment does what is forbidden. This case is analogous to Benton v. Maryland, 395 U.S. 784, 790-791 (1969), where a court's imposition of a judgment consisting of concurrent sentences was held to be a case with an adversary cast, and thus justiciable (Id., 395 U.S. at 791) because of the remote possibility that the State might, in the future, have both convictions held against the defendant.*

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*This distinguishes International Longshoremen's & Warehousemen's Union Local 37 v. Boyd, 344 U.S. 222 (1953), cited by the Government at 17 of its brief. There the suit was initiated to determine the effect of action by the parties to take place in the future based on Government action which had not yet occurred.

Further, the law is clear that appellant can challenge the constitutionality of the portion of his sentence which will not begin until the completion of his three-month term; thus, such a challenge is not premature. Peyton v. Rowe, 391 U.S. 54 (1968).* The Government does not challenge appellant's current indigence, nor could it, and the assertion that appellant's financial status may well improve (Government brief at 18) while he is in prison is simply beside the point. If appellant should benefit from this hypothetical financial windfall before the end of his three-month sentence so that he is able to pay the fine, his incarceration could, of course, be continued (under the terms of his sentence and of 18 U.S.C. §3565) until he agrees to pay. However if, as is most probable, at the time of his release appellant is still unable to pay the fine, he should not, solely because of his indigence, be subjected to any additional incarceration.** To require appellant to wait to challenge §3569,

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*The argument the Government makes here would preclude a challenge on appeal from a judgment of conviction to a count which resulted in the second of two consecutive sentences. Such a result is not only unnecessary under Peyton, but produces duplicative litigation the courts seek to avoid.

**Somehow the Government finds solace in counsel's affidavit withdrawing a motion to examine the presentence report. As was stated there, appellant cannot pay the $10,000 fine in a lump sum, and it is not known whether he can make smaller installment payments. To assume from these statements, as the Government does, that this renders the issue moot is incorrect, because there is no concession that appellant can make any payment at all, and indeed there is no factual basis for such a concession.

as the Government suggests, until he is eligible for release except for the time which will flow from the involuntary non-payment of the fine is to require that appellant remain incarcerated beyond that lawful period. In reality, the thirty-day period of incarceration would run before appellant could get a determination of the issue. In this context, a bar to relief on the ground of prematurity would extend "without practical justification the time a prisoner entitled to release must remain in confinement." Peyton v. Rowe, supra, 391 U.S. at 64.

The Government next argues in the alternative that a Bureau of Prisons policy statement* renders appellant's constitutional challenge to §3569 meritless. While it is comforting that both the Bureau of Prisons and the Department of Justice agree that the statute is unconstitutional, absent a declaration to that effect by this Court or Congressional repeal of the law, there is nothing, the policy statement included, which is binding upon the Government.

The Bureau of Prisons policy statement is issued pursuant to 18 U.S.C. §4042, in furtherance of the Bureau's duty to manage and regulate Federal penal institutions. Policy statements can be, and are, withdrawn or superseded without notice. That today it is the policy of the Bureau of Prisons not to detain an indigent prisoner who cannot pay a committed

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*See the separate appendix to appellant's main brief.

fine unfortunately does not insure that tomorrow, based on §3569, the Bureau of Prisons will not reverse that policy. Consequently, a decision by this Court declaring 18 U.S.C. §3569 unconstitutional is necessary to protect appellant from a statutorily authorized, but nonetheless illegal, thirty-day period of incarceration which would violate his constitutional right to equal protection of the law.

Appellant requests that this Court declare §3569 unconstitutional and direct that appellant be administered an oath of indigence prior to the commencement of the thirty-day term so that he need serve no period of incarceration because of indigence.

CONCLUSION

For the foregoing reasons and the reasons set forth in appellant's main brief, the judgment of the District Court should be reversed and the indictment dismissed; alternatively, a new trial should be ordered; at a minimum, the $10,000 fine should be vacated.

Respectfully submitted,

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Certificate of Service

September 29 , 1975

I certify that a copy of this reply brief [redacted] has been mailed to the United States Attorney for the Southern District of New York.

[signature]